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Book Review

INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT, by Anne Orford [1]

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THE RESPONSIBILITY TO PROTECT, an emerging international legal principle, gained notoriety in 2011 when it was invoked by the United Nations (UN) Security Council to justify sanctions against the former Libyan leadership.[3] In *International Authority and the Responsibility to Protect*, Anne Orford argues that the significance of this principle has been underestimated by many legal scholars, who view it as lacking either original normative content or genuinely 'legal' character. Orford contests such assessments by documenting the UN's use of the responsibility to protect as the foundation of a normative account of a new kind of international executive rule. Orford asserts that this form of authority has been generated through UN-led practices of administration and policing in the decolonized world over the past half-century. She argues that the responsibility to protect is being employed as a powerful (and potentially dangerous) justification for the reordering of relations of domestic and territorial jurisdiction resulting from these practices. At the same time, she contends, the principle raises fundamental constitutional questions about the subjects and agents of international law—questions that have largely been ignored by its most vocal advocates.

In 2001, the International Commission on Intervention and State Sovereignty (ICISS) identified an emerging principle of international law—the responsibility of states to protect the "human security" of their citizens.[4] According to the ICISS's

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1. (Cambridge, UK: Cambridge University Press, 2011) 235 pages.
2. Assistant Professor of Legal Studies, University of Ontario Institute of Technology.
3. The targeted sanctions resolution also included a referral of the Libyan situation to the International Criminal Court for investigation. See SC Res 1970, UN SCOR, 2011, UN Doc S/RES/1970 (2011). This resolution opened the door to subsequent NATO-led military intervention in support of the revolutionary forces in Libya.
4. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*

reading of crystallizing customary international law, when states fail to fulfill this fundamental role, the responsibility to protect devolves upon member states of the international community.[5] Under the leadership of Secretary-General Kofi Annan, a variant of the principle garnered the support of the 2005 World Summit. The responsibility to protect has since become the fulcrum of the UN's twenty-first century human-protection efforts under Secretary-General Ban Ki-moon. Special Advisers on the Responsibility to Protect and on the Prevention of Genocide have been appointed to collaborate on the concept's development and operationalization. The interpretation of the responsibility to protect now championed by the UN (the "RtoP") is an abstemious one, holding that the principle applies only when threats to human security take one of four forms: possible genocide, ethnic cleansing, war crimes, or crimes against humanity. As with many academic interpretations of the responsibility to protect (but contrary to the ICISS's original contention), a central feature of the RtoP perspective is the assertion that the principle is a moral and political one, lacking legal character.

Although, or perhaps because, Orford documents the history and aspirations of the reigning UN vision of the responsibility to protect with thoroughness and insight, she breaks with the RtoP perspective on just this point. For Orford, it is apparent not only that the responsibility to protect is a *legal* principle, but also that it is the concept's distinctive form of legal normativity that is the source of its reach and growing influence. Orford's primary interest in the responsibility to protect lies in the way in which it represents and gives formal expression to the "protective authority"[6] that international actors have claimed as their justification for intervening in decolonized states since 1960. In the first and second of the linked essays that comprise the book, Orford traces the emergence, since the mid-twentieth century, of dispersed practices of protection under the auspices of the UN in tandem with the genesis of an open-ended international executive authority asserted by consecutive Secretaries-Generals, beginning with Dag Hammarskjöld. Orford argues that the responsibility to protect concept has served as a vehicle for the integration of these two complementary developments into a rationalized and coherent account of international authority. This assessment fits neatly with Secretary-General Ban's description of the UN's RtoP agenda over the past half-decade as one of "doctrinal elaboration and institutional expression" of the concept, in service of the UN's primary role as an arbiter of global standards.[7]

(Ottawa: International Development Research Centre, 2001) at 15.

5. *Ibid* at 17.
6. *Supra* note 1 at 3.
7. Secretary-General Ban Ki-moon, "Human Protection and the 21st Century United Nations"

However, despite this descriptive congruity, the conclusions Orford reaches regarding the nature and import of the responsibility to protect differ from the dominant UN narrative in several key respects. While Orford agrees that the responsibility to protect "is not a form of law that imposes duties on subjects,"[8] she asserts that it nonetheless does possess legal normativity.[9] Orford claims that the responsibility to protect functions as law in the sense that it "confers powers 'of a public or official nature' and … allocates jurisdiction"[10] (analogous to, she argues, Article 99 of the *Charter of the United Nations* ["*Charter*"], which establishes the political authority of the Secretary-General).[11] Orford's view is that the responsibility to protect has been wrongly deemed insignificant or lacking in normative content because it has been consistently mis-categorized by critics. She argues that most commentators have only assessed the responsibility to protect's merits as a form of law that imposes duties and thus have naturally found it wanting. In fact, Orford observes, the responsibility to protect belongs to another class of laws entirely: laws that confer powers and create a "discretionary mandate" that provides legal authorization for particular classes of activities.[12] Thus, Orford claims, "The vocabulary of 'responsibility' works here as a language for conferring authority and allocating powers rather than as a language for imposing binding obligations and commanding obedience."[13]

Orford regards the UN's adoption of the responsibility to protect as an instance of a larger phenomenon that she traces back to the Holy Roman Empire: the assertion of jurisdiction without territory on the grounds that the agent who claims international authority represents universal interests that trump those of territorially-bounded entities. In her chapter, "Who Decides? Who Interprets? Jurisdiction, Recognition and the Institutionalisation of Protection,"[14] Orford suggests that the UN has employed the responsibility to protect as a justificatory ideology to strengthen its claim that it represents the universal and, under certain circumstances, that it legitimately exercises the functions of particular sovereigns

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(Cyril Foster Lecture, delivered at Oxford University, 2 February 2011), online: United Nations <http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=1064>.

8. *Supra* note 1 at 25.
9. *Ibid.*
10. *Ibid.* Orford is here adverting to HLA Hart's famous classificatory scheme that divides laws into duty-imposing or power-conferring types. See HLA Hart, *The Concept of Law* (London: Oxford University Press, 1961) at 28.
11. 26 June 1945, Can TS 1945 No 7.
12. *Supra* note 1 at 26.
13. *Ibid*.
14. *Ibid* at 139.

as a consequence. Orford points out that this contention depends upon a functionalist account of international society, which views sovereignty as consisting of a bundle of competencies, privileges, and immunities. According to this line of thinking, when crises occur that threaten human security, the bundle is disaggregated and the responsibility to protect is interpreted by the UN as offering a normative justification for its (temporary) acquisition of some of these unbundled competencies.

The UN's grounds for assigning itself the role of default sovereign in such circumstances lie in its claim to neutrality. However, Orford denies the validity of this assertion of impartiality, pointing to the way that grounding authority in the capacity to protect has the effect of privileging certain types of domestic actors and institutions, as well as particular forms of political, social, and economic organization. As she puts it: "To characterise a situation as one of civil war or anarchy [necessary for triggering the responsibility to protect] is to register the absence of some preconceived form of integrative force."[15] This kind of force, of course, looks much like the apparatus of a centralized and vertically integrated state.

In this respect and others, the UN is not neutral among competing actors and agendas; this bias is consistent with both the *Charter*-mandated legal centrism of the organization and with the UN's preferred reading of the addressees of the responsibility to protect. The UN's interpretation of the principle envisions a global constitutional order in which the agents empowered to bear and to act upon the responsibility to protect are in the first instance states or, if they default, coalitions of states acting under the auspices of the UN. (Orford notes that, in its pared-down reformulation of the ICISS's responsibility to protect, the UN World Summit of 2005 excised any hint that entities other than states or UN-mandated combinations of states were eligible to invoke the responsibility to protect). As a consequence of these commitments, the responsibility to protect and the UN human protection agenda to which it contributes are being developed in a way that reinforces the hierarchical advantage of states in transnational society at a critical moment of transition in the evolution of global law. Orford draws our attention to the fact that this use of the principle is not a consequence of any feature intrinsic to it.

In her chapters "How to Recognise Lawful Authority: Hobbes, Schmitt and the Responsibility to Protect "[16] and "The Question of Status and the Subject of Protection,"[17] Orford turns her critical gaze to another tradition of politico-legal

15. *Ibid* at 133.
16. *Ibid* at 109.
17. *Ibid* at 189.

theory that undergirds the responsibility to protect principle. This line of argument begins with Thomas Hobbes' contention, born of the English Civil War, that the authority of the state is premised upon its ability to defend its subjects in times of political upheaval—a privileging of de facto authority later embraced most notably by Carl Schmitt in the wake of the First World War.

Orford suggests that this tradition is the progenitor of the dominant justification for projecting international authority into the decolonized world since the mid-twentieth century: the ascribed absence of centralized institutions capable of exercising a protective function.[18] She goes on to show how reliance upon the capacity to exercise protection as the grounds for authority served as the rationale for developing techniques of control to manage decolonization, including disciplinary surveillance, security sector reform, administration, and controls on the movement of peoples.[19] But as Orford deftly reveals, the effectiveness of this functionalist approach to asserting authority hangs upon its avoidance of the question of that authority's *normative* foundations, and with it, the question of juridical status—that is, the relation between state, ruler, and people.[20] In order for this new administrative order of executive rule to be accepted, the question of who the state is—that is, "the legal subject with the status to represent the welfare of the people and to lay down the law"[21]—must be avoided.

Similarly, the decision that human protection measures must be implemented by a 'universal' authority has to be depicted as algorithmic in character, rather than as the quintessentially political and context-specific choice that Orford rightly argues it to be. As Orford succinctly puts the matter:

> The decision that a state needs help to protect its population does not simply involve the assessment of facts, but requires an account of the social conditions under which protection can best be guaranteed and whether there are other community values that are more important than guaranteeing security in a given situation**.** Making decisions about whether and how a government can best protect its population goes to the heart of politics.[22]

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18. *Ibid* at 133.
19. *Ibid* at 193.
20. *Ibid* at 195, 206.
21. *Ibid* at 206.
22. *Ibid* at 183. The prevailing interpretation of the responsibility to protect relies on the (unsupported) assumption that consensus exists on the content and the preeminence of "human security"; such a consensus (if it existed) would obviate the need for such public deliberation. (On this point, see Natalie Oman, "Hannah Arendt & the Right to Have Rights" (2010) 9 J of Human Rights 279.)

Although she does not frame it in these terms, one of Orford's main achievements in this passage lie in drawing attention to the promiscuity of the responsibility to protect principle. She documents but does not fully thematize the fact that the principle lends itself to cooptation by multiple juridical projects, both revolutionary and counter-revolutionary.[23] The principle can, for example, act as the normative basis for an account of the lawfulness of a form of authority founded upon the capacity to ensure human security, and also serve to disrupt the international legal consensus regarding the irrelevance of the question of who the 'state' is.[24]

In her conclusion, Orford chooses to be optimistic about the role that the responsibility to protect might play in the future. She argues that in this postcolonial moment, any attempt to implement the principle must necessarily remind us of the contested character of judgments about the "forms and ends" of lawful authority.[25] Those who would use the principle to justify the link between authority and protection must therefore acknowledge the ugly history of interventions by "defend[ing] the utility of their actions in concrete situations."[26] At the same time, the principle's invocation compels the rest of us to attend to the *political* nature of the task of translating ideas of protection and responsibility into specific polities and legal rules.[27]

Orford's book offers a powerful and nuanced argument for the relevance of the responsibility to protect to the remaking of the international legal landscape. It critically documents the continuity of control and administration practices now being rationalized under the rubric of the principle with the technologies of governmentality first introduced by the UN in the period of decolonization (with roots that date back much farther). It identifies how the privileging of the centralized state, which is one of the aims of such practices, is reiterated in the legal centrism of the UN's interpretation of the responsibility to protect.

However, Orford's even-handedness in acknowledging the strengths of that interpretation and recording its dangers is the source of one of two minor frustrations for the reader. After demonstrating an evident appreciation of the conservative and inegalitarian consequences of this legal centrist reading, one might naturally anticipate that Orford would offer an alternative, remedial

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23. *Supra* note 1 at 208.
24. I explore this theme in *A Philosophical Investigation of the Responsibility to Protect*, ch 5, forthcoming in 2014.
25. *Supra* note 1 at 212.
26. *Ibid*.
27. *Ibid* at 210, 212.

account of the responsibility to protect's ambit; however, Orford does not challenge the agenda by applying the internal logic of the principle itself. Why, for example, does the protective function asserted by UN proponents of the RtoP vest only in states, and not in any other candidates? Similarly, the claim Orford makes concerning the *legal* character of the responsibility to protect in the early chapters of the book is one of her most interesting and contentious contributions, yet once again the reader wishes for more. This argument would be strengthened by looking more closely into the genealogy of the principle in classic sources of international law; I have argued elsewhere that such an examination reveals the principle's parallel sources in both customary international law and general principles of law.[28]

In the face of Orford's achievement in this book, these are minor cavils. As the preceding discussion attests, the book works most effectively not as an attempt to advocate for or to develop the responsibility to protect, but as a penetrating survey of the fundamental questions about international law raised by the principle's rise to prominence and as a warning against complacency about the possibility of its neutral use. The main accomplishment of these keenly observed essays lies in tracking the rise of a new form of international governance that is facilitated and justified by the discourse of the responsibility to protect.

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28. Natalie Oman, "Could R2P Justify a No-Fly Zone in the Absence of Security Council Approval? Natalie Oman, "Could R2P Justify a No-Fly Zone in the Absence of Security Council Approval?" Opinio Juris (17 March 2011), online: Opinio Juris <http://opiniojuris.org/2011/03/17could-rtop-justify-a-no-fly-zone-in-the-absence-of-security-council-approval/>.